

BETWEEN TWO CONSTITUTIONS: FEMINISM AND PORNOGRAPHY

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Any one who knows what the worth of family affection is among the lower classes, and who has seen the array of little portraits stuck over a labourer's fire-place, still gathering into one the "Home" that life is always parting—the boy that has "gone to Canada," the girl "out at service," the little one with the golden hair that sleeps under the daisies, the old grandfather in the country—will perhaps feel with me that in counteracting the tendencies, social and industrial, which every day are sapping the healthier family affections, the sixpenny photograph is doing more for the poor than all the philanthropists in the world. (*Macmillan's Magazine*, Sept. 1871).

To photograph people is to violate them, by seeing them as they never see themselves, by having knowledge of them they can never have; it turns people into objects that can be symbolically possessed. Just as the camera is a sublimation of the gun, to photograph someone is a sublimated murder—a soft murder, appropriate to a sad, frightened time. (Susan Sontag, *On Photography*, 1977)

For reasons that remain obscure, the University of Minnesota Law School has been extraordinarily productive of theories about pornography. Not so long ago, former Dean William Lockhart and Professor Robert McClure wrote several influential articles on the subject. Then Dean Lockhart chaired the United States Commission on Pornography and Obscenity, whose report in 1970 recommended legalizing the sale of pornography to adults. The commission took an empirical approach to the subject, and found no substantial evidence that exposure to pornography leads to antisocial behavior. Although dismissed by President Nixon as "morally bankrupt," the report was generally well-received in the liberal community.

There was, to be sure, an undercurrent of doubt. As early as 1969, when a *New York Times* editorial bemoaned sex on the stage, some liberals expressed qualms about whether freedom had been carried too far. Most of them, however, were not prepared to endorse censorship. The *Times*, having raised the issue, decided

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that the invisible hand of laissez-faire would work its magic. "When there is no lower depth to descend to, ennui will erase the problem."

Others were less complacent. Feminists of the seventies decided that pornography expresses the ideology of male supremacy. Then, in the fall of 1983, two remarkable women fashioned a novel legal concept out of this feminist theory of pornography. One of these women, Professor Catharine MacKinnon, was a graduate of the Yale Law School who had taught briefly at Harvard, Yale, and Stanford before joining the Minnesota Law faculty. She specialized in constitutional law and sex discrimination. At her request, the Law School asked Ms. Andrea Dworkin to join the faculty as an adjunct professor and co-teacher of a new seminar about pornography. Ms. Dworkin is a prolific feminist author, whose works have been praised by Gloria Steinem among others. She is also a gifted orator, a frequent speaker at conferences of the National Organization of Women, and at many of the leading universities, including Smith, Pennsylvania, and the Massachusetts Institute of Technology. She gave the keynote address on Women Take Over The Law School Day in Minnesota. Her status as a feminist thinker was summarized by Professor MacKinnon: "The blunt elegant precision of Andrea Dworkin's arguments, the clarity and sweep of her vision, the compelling urgency of her voice, have moved women for nearly a decade."¹

MacKinnon and Dworkin drafted an ordinance embodying the idea that pornography violates women's civil rights. The ordinance began with findings about the effects of pornography. It is "central in creating and maintaining the civil inequality of the sexes"; "a systematic practice of exploitation and subordination based on sex which differentially harms women" and promotes bigotry, contempt, and aggression; harms "women's opportunities for equality of rights"; promotes rape, battery, and prostitution; and undermines "women's equal exercise of rights to speech and action." The ordinance defined pornography as "the sexually explicit subordination of women, graphically depicted, whether in pictures or in words, that also includes" at least one of several attributes, including depiction of women "dehumanized as sexual objects, things or commodities"; or as "sexual objects" who "enjoy pain or humiliation" or rape; or "in postures of sexual submission"; or exhibits "women's body parts" in such a way that "women are reduced to those parts"; or "women are presented as

1. MacKinnon, *Complicity: An Introduction to Andrea Dworkin*, "Abortion," Chapter 3, *Right-Wing Women*, 1 LAW & INEQUALITY 89, 90 (1983).

whores by nature"; or in "scenarios of degradation" including various indicia of violence. The ordinance also declared that the use of men, children, or transsexuals instead of women would be pornography under the same circumstances.

Under the ordinance, the production, sale, exhibition, or distribution of pornography was "discrimination against women." Private clubs for such purposes were made illegal. But public libraries were allowed to have it available for study, even on open shelves, provided that they did not have "special display presentations."

Any woman had a cause of action for an injunction under the ordinance, as did any "man or transsexual who alleges injury by pornography in the way women are injured by it." In addition, any person who had been coerced, intimidated, or fraudulently induced into performing for pornography was entitled to enjoin its distribution and recover damages against the maker, seller, exhibitor or distributor. In such suits, the fact that the model "showed no resistance or appeared to cooperate actively in the photographic sessions" or "signed a contract, or made statements affirming a willingness to cooperate in the production of pornography," or "actually consented to a use of the performance that is changed into pornography" would not "without more, negate a finding of coercion."

The ordinance also created a cause of action for anyone "who has pornography forced on him/her in any place of employment, in education, in a home, or in any public place." Finally, anyone "who is assaulted, physically attacked or injured in a way that is directly caused by specific pornography" was authorized to sue "the perpetrator" and anyone in the chain of distribution.

Passed by the Minneapolis City Council over the protests of civil libertarians, the ordinance was vetoed by Mayor Fraser. He contended that some of its main provisions were unconstitutionally vague. Thereafter, the feminists rewrote the ordinance, somewhat reducing its ambiguities. Once again, the city council passed their proposal, only to be thwarted by another mayoral veto. In Indianapolis, however, a revised version of the ordinance was signed into law. A federal district court found it unconstitutional, and an appeal is pending.

The idea that pornography violates women's rights is likely to endure, if not as a legal definition of pornography, at least as a justification for vigorous enforcement of more traditional laws against it. In any case, it is a fascinating page of constitutional history. With that in mind, we have reproduced the ordinance, as

originally passed by the Minneapolis City Council, beginning at page 181. It would make a pretty good law school exam question, inviting discussion of prior restraint, vagueness, overbreadth, group defamation, and of course the line between obscenity and constitutionally protected expression. A constitutional law class might compare the ordinance with the guidelines laid down in *Miller v. California*,² as applied to *Ulysses*, *Lady Chatterley's Lover*, *Tropic of Cancer*, the most recent issue of *Playboy*, hardcore pornography depicting male and female homosexuality, and whatever else comes to mind.

Any such exercise quickly demonstrates the need for an understanding of the drafters' philosophy. This is especially important for those readers who are unfamiliar with feminist literature. Even with the best of intentions, the uninitiated are likely to be confused by some of the ordinance's novel concepts.

What follows might be called a reader's guide to the ideology of the Minneapolis pornography ordinance, based on the writings of feminist authors, especially Ms. Dworkin's book about pornography.

I

In 1973, three feminist editors published an anthology titled *Radical Feminism*.³ None of the forty-odd contributors described pornography as a major problem. Kate Millet, a member of the Columbia faculty, stressed typical themes. She called for reappraisal of masculine and feminine traits; abolition of sex roles; abolition of mandatory heterosexuality; and cessation of the brutality, capitalism, and warfare that she linked to male sexuality. Another entry, *Politics of the Ego: A Manifesto of New York Radical Feminists*, described the enemy's citadel: "The oppression of women is manifested in particular institutions constructed and maintained to keep women in their place. Among these are the institutions of marriage, motherhood, love and sexual intercourse (the family unit is incorporated by the above)."⁴

The more revolutionary of these ideas have made little tangible progress. But in 1975 Susan Brownmiller propounded another line of analysis. Her arguments were those of a radical feminist. But her targets—rape, prostitution, and pornography—were more vulnerable than love, motherhood, and sexual intercourse. Brownmiller's best seller, *Against Our Will: Men, Women, and*

2. 413 U.S. 15 (1973).

3. RADICAL FEMINISM (A. Koedt, E. Levine & A. Rapone eds.).

4. *Id.* at 379, 381.

Rape, described rape as "a deliberate, hostile, violent act of degradation and possession on the part of a would-be conqueror, designed to intimidate and inspire fear."⁵ Developing this thesis, she devoted considerable attention to rapes by Nazis. To combat rape,

we must look toward those elements in our culture that promote and propagandize these attitudes, which offer men, and in particular, impressionable adolescent males, who form the potential raping population, the ideology and psychologic encouragement to commit their acts of aggression *without awareness, for the most part, that they have committed a punishable crime*, let alone a moral wrong.⁶

She identified two major "institutions" that support rape: prostitution and pornography. Women, she observed, are more likely than men to be offended by pornography.

From whence comes this female disgust and offense? Are females sexually backward or more conservative by nature? The gut distaste that a majority of women feel when we look at pornography, a distaste that, incredibly, it is no longer fashionable to admit, comes, I think, from the gut knowledge that we and our bodies are being stripped, exposed and contorted for the purpose of ridicule to bolster that "masculine esteem" which gets its kick and sense of power from viewing females as anonymous, panting playthings, adult toys, dehumanized objects to be used, abused, broken and discarded.⁷

The sex in pornography, then, like the sex in rape, is not mere doggish lust. It is sadistic, a harmful expression of power, not a harmless fantasy about sex. "Pornography is the undiluted essence of anti-female propaganda." Like rape, it is "designed to dehumanize women, to reduce the female to an object of sexual access, not to free sensuality from moralistic or parental inhibition."⁸ Or, in Robin Morgan's often-quoted slogan: pornography is the theory, rape is the practice.

Where is the line between rape and acceptable sexual intercourse? What is the relationship between ordinary sex and pornography? Morgan's *Going Too Far*, published in 1977, answered these questions.

I claim that rape exists any time sexual intercourse occurs when it has not been initiated by the woman, out of her own genuine affection and desire. . . . Anything short of that is, in a radical feminist definition, rape. Because the pressure is there and it need not be a knife-blade against the throat; it's in his body language, his threat of sulking, his clenched or trembling hands, his self-deprecating humor or angry put-down or silent self-pity at being rejected. . . . This normal, corn-fed kind of rape is less shocking if it can be realized and admitted that the act of rape is merely the expression of the standard, "healthy," even encouraged male fantasy

5. S. BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 391 (1975).

6. *Id.* (emphasis in original).

7. *Id.* at 394.

8. *Id.*

in patriarchal culture—that of aggressive sex. And articulation of that fantasy into a billion-dollar industry is pornography.⁹

Two years later, Andrea Dworkin's *Pornography: Men Possessing Women* provided a comprehensive radical feminist analysis of pornography. Together with Professor MacKinnon's writings, it sets forth an arresting ideology, with eight major tenets.

1. *The context of pornography is male supremacy.* Most authors discuss pornography as a problem of freedom of expression, or of sexual vulgarity or permissiveness, or of possible causation of sex crimes. Like many other feminists, Dworkin and MacKinnon contend that pornography's implications are much broader and more hideous. In their view, it can only be understood within the larger context of male supremacy maintained by violence.

To understand pornography, one must understand men. "The immutable self of the male boils down to an utterly unself-conscious parasitism," a conviction, "beyond reason or scrutiny, that there is an equation between what one wants and the fact that one is."¹⁰ The male sense of self is so powerful that "some assert that it survives physical death."¹¹ This self "is incrementally expanded as the parasite drains self from those not entitled to it." "As a child, the first self he drains is that of his mother—whatever she has of it is reserved for him." As the boy matures, he transfers this parasitism to other females, "who have more succulent selves to which they are not entitled."¹²

Men believe that they are stronger and therefore entitled to dominate. Their culture does not permit women to be virile or dominant. Accordingly, they penalize physical strength in women except when it is employed in housework. Significantly, the higher a woman's economic class (and hence the closer she is to power) the less physical strength she is likely to have.¹³

This induced lack of physical strength has enormous implications:

[P]ower is the capacity to terrorize, to use self and strength to inculcate fear, fear in a whole class of persons of a whole class of persons. The acts of terror run the gamut from rape to battery to sexual abuse of children to war to murder to maiming to torture to enslaving to kidnapping to verbal assault to cultural assault to threats of death to threats of harm backed up by the ability and sanction to de-

9. R. MORGAN, *GOING TOO FAR* 165-66 (1977) (emphasis in original).

10. A. DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 13-14 (1979).

11. *Id.* at 13.

12. *Id.* at 14.

13. *Id.* at 14-15.

liver. The symbols of terror are commonplace and utterly familiar: the gun, the knife, the bomb, the fist, and so on. Even more significant is the hidden symbol of terror, the penis. The acts and the symbols meet up in all combinations, so that terror is the outstanding theme and consequence of male history and male culture, though it is smothered in euphemism, called glory or heroism. Even when it is villainous, it is huge and awesome. Terror issues forth from the male, illuminates his essential nature and his basic purpose. He chooses how much to terrorize, whether terror will be a dalliance or an obsession, whether he will use it brutally or subtly. But first, there is the legend of terror, and this legend is cultivated by men with sublime attention. In epics, drama, tragedies, great books, slight books, television, films, history both documented and invented, men are giants who soak the earth in blood.¹⁴

Within this legend, "women are booty, along with gold and jewels and territory and raw materials."¹⁵ To a considerable degree, women are still chattels in modern America—for instance, wife-beating and rape of wives are generally tolerated.¹⁶ Such practices express the male conception of women as mere objects. This conception is expressed and reinforced by culture. Male terror is "generated by its own enduring reputation, whether exquisite as in Homer, Genet, or Kafka; or fiendish as in Hitler, the real Count Dracula, or Manson. Rotting meat smells; violence produces terror. Men are dangerous; men are feared."¹⁷

Why do boys grow up to be this way? The answer is not biological. It is, rather, that they choose to do so. The boy sees his mother—weak, degraded, beaten. He can choose to be like her, or instead to "become a man, one who has the power and the right to hurt, to use force, to use his will and physical strength over against women and children." He can "[b]e the mother—be fucked—or be the father—do the fucking." Naturally, he "chooses to become a man because it is better to be a man than a woman."¹⁸ But men always recall their boyhood vulnerability to their brutal father. To protect themselves from other men they "transform their fear of male violence into metaphysical commitment to male violence," which becomes for men "the central definition of any experience that is profound and significant,"¹⁹ whether they are right-wingers or left-wingers, pugilists or pacifists. "Some men will commit violence against the minds of others and some against the bodies of others. Most men, in their life histories, have done both."²⁰

14. *Id.* at 15-16.

15. *Id.* at 16.

16. *Id.* at 19, 103.

17. *Id.* at 17.

18. *Id.* at 49.

19. *Id.* at 51.

20. *Id.* at 52.

2. *Male sex is violent.* Some feminist writers attack not only the patently cruel or illegal forms of sexual abuse but also what others regard as everyday sex. On this issue, Germaine Greer is a moderate. Without wholly forsaking men, she has come to the conclusion that recreational sex is overrated: "Most of the pleasure in the world is still provided by children and not by genital dabbling." She mentions that her female cat "wept piteously" while being impregnated, but purred while delivering and nursing her litters.²¹ Ms. Dworkin offers an explanation: what men call sex is really "antagonism and violence, mixed in varying degrees."²² "There is no male conception of sex without force as the essential dynamic."²³ "So long as dominance is eroticized," adds MacKinnon, women will sometimes desire this male style of sex, but it is nonetheless violent.²⁴

Like everyone else, Dworkin and MacKinnon condemn rape. But they stress that this crime, far from being deviant, closely resembles ordinary sex. "What," asks MacKinnon, "is it reasonable for a man to believe concerning a woman's desire for sex when heterosexuality is compulsory?"²⁵ Rapists, she opines, are "men who do little different from what nondeviant men do regularly."²⁶ "To the extent possession is the point of sex, rape is sex with a woman who is not yours, unless the act is so as to make her yours."²⁷

Why do men believe that sexually experienced women are fair game for rape? "It is difficult to avoid the conclusion," says MacKinnon, "that penetration itself is known to be a violation and that women's sexuality, our gender definition, is itself stigmatic."²⁸

The point of defining rape as "violence not sex" or "violence against women" has been to separate sexuality from gender in order to affirm sex (heterosexuality) while rejecting violence (rape). The problem remains what it has always been: telling the difference. The convergence of sexuality with violence, long used at law to deny the reality of women's violation, is recognized by rape survivors, with a difference: where the legal system has seen the intercourse in rape, victims see the rape in intercourse. The uncoerced context for sexual expression becomes as elusive as the physical acts come to feel indistinguishable. Instead of asking, what

21. G. GREER, *SEX AND DESTINY: THE POLITICS OF HUMAN FERTILITY* 257, 260 (1984).

22. A. DWORKIN, *supra* note 10, at 18.

23. *Id.* at 176.

24. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635, 650 (1983).

25. *Id.* at 654.

26. *Id.* at 643.

27. *Id.* at 644.

28. *Id.* at 648.

is the violation of rape, what if we ask, what is the nonviolation of intercourse? To tell what is wrong with rape, explain what is right about sex. . . . Perhaps the wrong of rape has proven so difficult to articulate because the unquestionable starting point has been that rape is definable as distinct from intercourse, when for women it is difficult to distinguish them under conditions of male dominance.²⁹

Men like to depict themselves as gripped by passion. Whether it is the grin of a freckle-faced girl, or the flash of a harlot's thigh, they take it for granted, says Dworkin, that their sexual response to women "is an objectified response: that is, a response aroused by an object with specific attributes that in themselves provoke sexual desire."³⁰ In fact, however, the male's sexual pleasure comes from wielding the power of the imperial penis. For instance, men frequent prostitutes because they enjoy the sense of domination.³¹ Claims to the contrary are "willfully naive and self-serving." The male "forces" the female "to become that thing that causes erection, then holds himself helpless and powerless when he is aroused by her."³² His fetishes are ultimately sadistic and political. He may prefer blondes; this preference is "inseparable from his hatred of Jews, blacks, and Chinese."³³ Or he may prefer brunettes, and this too signifies racial hatred: such men need "to choose people they consider fecal (e.g., black, Jewish, poor, uneducated, prostituted)."³⁴

Sex, for men, is a brutal thrust. "Sex, a word potentially so inclusive and evocative, is whittled down by the male so that, in fact, it means penile intromission."³⁵ Professor MacKinnon believes that "penile invasion of the vagina may be less pivotal to women's sexuality, pleasure or violation, than it is to male sexuality."³⁶ "Fucking," says Dworkin, "is an act of possession—simultaneously an act of ownership, taking, force; it is conquering; it expresses in intimacy power over and against, body to body, person to thing."³⁷

Male propagandists try to maintain male supremacy by pretending that "it is a biological impossibility for females to use sexual force, that is, to be sexually controlling or dominant."³⁸ Women, Professor MacKinnon notes, sometimes contribute to this

29. *Id.* at 646-47.

30. A. DWORKIN, *supra* note 10, at 113.

31. *Id.* at 119.

32. *Id.* at 22.

33. *Id.* at 114.

34. *Id.* at 114 (quoting Robert Stoller).

35. *Id.* at 23.

36. MacKinnon, *supra* note 24, at 647.

37. A. DWORKIN, *supra* note 10, at 23.

38. *Id.* at 134.

myth, by giving biological explanations of why it is men, and not women, who are rapists. Such authors fail "to explain why women do not engulf men, an equal biological possibility."³⁹

True, men have passed laws against rape, including the superficially strict concept of statutory rape. But "[t]he age line under which girls are presumed disabled from withholding consent to sex rationalizes the condition of sexual coercion women never outgrow. As with protective labor laws for women only, dividing and protecting the most vulnerable becomes a device for not protecting everyone."⁴⁰

The male belief that women are whorish by nature is supplemented by another idea—that women are inhibited and have low sex drives. "Perhaps this is a recognition, however perverse, that no one could possibly like and want what men do to women." Although these two male ideas may appear to be contradictory, they are actually complementary: "The woman who does not want it must be forced. Once the woman who does not want it has been forced, she is indistinguishable from the woman who resisted because she did want it. Male supremacy is dizzying in its unrelenting circularity."⁴¹

Men try to obliterate the individual female personality. For instance, Casanova once said that all women are the same when the lights are out. Ms. Dworkin says that this was an expression of a characteristically male preference for intercourse in the dark. "The dark comforts him because it dims personality; he has sex in the dark to convince himself that all women are the same, without individual substance or importance, a la Casanova."⁴²

Many attitudes and practices that appear to have other origins are in fact products of the male drive for power. This explains, for example, opposition to abortion: "One does not abort his victory. The right wing must have its proof, its triumph; she, a woman of sex, must be marked."⁴³ Professor Dworkin continues:

The pregnancy is punishment for her participation in sex. She will get sick, her body will go wrong in a thousand different ways, she will die. The sexual excitement is in her possible death—her body that tried to kill the sperm being killed by it. Even in pregnancy, the possibility of her death is the excitement of sex. And now, the doctors have added more sex—to birth itself. *Vagina* means sheath. They cut directly into the uterus with a knife—a surgical fuck. . . . The epidemic of cesarian sections in this country is a sexual, not a medical, phenomenon. The

39. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 528 n. 24 (1982).

40. MacKinnon, *supra* note 24, at 648.

41. A. DWORKIN, *supra* note 10, at 179.

42. *Id.* at 64.

43. *Id.* at 222.

doctors save the vagina—the birth canal of old—for the husband; they fuck the uterus directly, with a knife. . . . [The surgeon is] the new rapist.⁴⁴

Liberalization of abortion laws, while desirable, also serves men's purposes. As Professor MacKinnon observes, "[t]o the extent that the point of abortion is to control the reproductive sequelae of intercourse, so as to facilitate male sexual access to women, access to abortion will be controlled by 'a man or The Man.'"⁴⁵

3. *Female "consent" is illegitimate.* Perhaps the major problem for radical feminists is women's complicity in what the feminists say is their own degradation. Since some women participate in creating pornography, and most women participate in and often seem to enjoy the culture of patriarchy and heterosexuality, how can these be regarded as degrading to women? Feminists have addressed this problem on two levels of analysis. First, they emphasize that men often lie about consent—accused of rape, they claim seduction. Dworkin and MacKinnon say that analogous lies are told by pornography. Ostensibly, the pictures depict voluntary sex; in fact, the female models have often been forced to perform. The star witness at the Minneapolis hearings was a famous former pornographic film star, later happily married. Linda Lovelace, as she was known in her movie days, testified that she had been a virtual slave while performing. "[Every] time someone watches that film, they are watching me being raped."⁴⁶ To show that this experience was not unusual, sociologist and feminist author Kathleen Barry testified about similar occurrences:

Prior to being 'turned out' to prostitution, many pimps 'season' or break down their victims through sessions of rape and other forms of sexual abuse. Sometimes those sessions are photographed or filmed or used in a variety of ways which include personal pleasure of the pimp and his friends, blackmailing the victim by threatening to send them to her family, and selling them to the pornographers for mass production. This constitutes the use of pornography as a form of torture and the marketing of actual torture sessions in the form of film and pictures as a pleasure commodity.⁴⁷

Other kinds of sexual intimidation were also described. One woman testified that

[d]uring the second year of our marriage he started reading more and more pornography. He started out reading *Playboy* and started picking up magazines like

44. *Id.* at 223.

45. MacKinnon, *supra* note 24, at 644.

46. Testimony, Public Hearings on Ordinance to Add Pornography as Discrimination Against Women, Minneapolis Government Operations Committee, Session I at 56 (Dec. 12, 1983) (hereinafter "Testimony"). See also L. LOVELACE, *ORDEAL* (1980).

47. Testimony, Session I at 58-59.

Penthouse and *Forum* and as I would come home for dinner . . . he would read excerpts from the magazines. Some of them were articles and some of them were letters to the editor, ranging from group sex, wife swapping, and anal intercourse and bondage, to mention a few. I was really repulsed at the things he was reading me and I was really in disbelief He bought more and more magazines to prove to me that people weren't making it up; that all of these people were saying how wonderful these things were. . . . We would meet together as a group [at] pornographic adult theaters of live sex shows. Initially I started arguing that the women on stage looked very devastated like they were disgusted and hated it. I felt disgusted and devastated watching it. I was told by those men if I wasn't as smart as I was and if I would be more sexually liberated and more sexy, that I would get along a lot better in the world and that they and a lot of other men would like me more. . . . About this time when things were getting really terrible and I was feeling very suicidal and worthless as a person, at that time any dreams that I had of a career in medicine was [sic] just totally washed away. I could not think of myself any more as a human being.⁴⁸

Linda Lovelace's slavery is symbolic of the more subtle and much more common forms of coercion that radical feminists say pervade relations between the sexes. MacKinnon emphasizes that coercion is so ubiquitous that the very concept of coercion, which implies a voluntary sphere of heterosexual relations, is itself misleading and oppressive. Prosecution of rapists, she says, leaves undisturbed "the assumption that women generally consent to sex."⁴⁹ Of course, by the conventional definition women do consent. But MacKinnon tells us that this is because they eroticize dominance, or fear the consequences of refusal. In our culture, where heterosexuality is mandatory, and where patriarchy is reinforced in countless ways, no woman is truly free to decide about sex with a man. For "[c]onsent . . . is a reality only between or among peers."⁵⁰ In a world full of traditional women, consent does not confer legitimacy. And since "women are socialized to passive receptivity," and "rape consented to is intercourse,"⁵¹ consent is not the solution. It is a symptom of the problem.

4. *Pornography is the sexually explicit expression of the ideology of male supremacy.* To understand the feminist analysis of pornography, it is useful to begin with the liberal analysis to which it is a reaction. An eloquent recent argument against prohibiting pornography appears in Professor Laurence Tribe's 1978 treatise, *American Constitutional Law*. Reviewing the history of suppression, Professor Tribe comments that prosecutions under the old "tendency to deprave and corrupt" standard "took a heavy

48. Testimony, Session II at 61-63.

49. MacKinnon, *supra* note 24, at 644.

50. A. DWORKIN, *supra* note 10, at 59.

51. MacKinnon, *supra* note 24, at 649.

toll on contemporary literature," including both *An American Tragedy* and *Lady Chatterley's Lover*.⁵² Even today, says Tribe, the Supreme Court's decisions in obscenity cases have been erratic. The underlying problem is "the lack of a principled foundation."⁵³ "There is little likelihood that this development has reached a state of rest—or that it will ever do so until the Court recognizes that obscene speech *is* speech nonetheless, although it is subject—as is all speech—to regulation in the interests of unwilling viewers, captive audiences, young children, and beleaguered neighborhoods—but *not* in the interest of a uniform vision of how human sexuality should be regarded and portrayed."⁵⁴

One unfortunate effect of the Court's endorsement of "community standards," warns Professor Tribe, is that "the pressure on a publisher or distributor to conform to the lowest common denominator of sexual acceptability of course becomes enormous, especially since the defendant need not be shown to have realized that his work was obscene."⁵⁵

Despite the shortcomings of some decisions in this field, Tribe praises one aspect of the judicial treatment of obscenity: "[T]he Court has insisted that 'thematic obscenity' is fully protected as a form of speech, so that a state cannot, for example, ban distribution of a film on the ground that it advocates adultery or makes fornication seem like fun."⁵⁶ On the other hand, the Court's refusal to protect hard-core pornography is inconsistent with first amendment principles. "It may be that hard-core pornography has little ideological content—although hedonism is surely an idea—but the first amendment has not generally been confined to the protection of high-minded discussion among savants"⁵⁷

The Court's justifications for censoring hard-core pornography are much too simplistic and absolute:

To some, pornography depicts man reduced to the sorry sum of his basest appetites; to others, it eases psychosexual tensions or provides a release through fantasy, much like disaster films or soap operas, from the confines of the dreary present. To some, it represents shameless exploitation of the frustrated and the compulsive; to others, it symbolizes liberation from the compulsions of a leaden, regimented, and ultimately oppressive social order. The pride Comstock felt at having destroyed "something over fifty tons of vile books [and] 3,984,063 obscene pictures," most of which today would be likely to shock no one, should suggest a

52. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 658-59 (1978).

53. *Id.* at 663 n. 50.

54. *Id.* at 661-62 (emphasis in original).

55. *Id.* at 665.

56. *Id.* at 665-66.

57. *Id.* at 666.

sober skepticism about any claim that the latest threat to decency has finally crossed the line of the tolerable: What was once beyond the pale rests comfortably on today's living-room end table.

The mid-1970's prosecutions of people who publish magazines like *Hustler*—a mix of eroticism, violence and misogyny—may finally have separated the literati from the targets of government censorship. It has been thoughtfully observed that the “journey from *Ulysses* to *Hustler* involves more than a move from literature to smut, from words to images. It involves the transition from the preoccupation of an educated minority to the everyday fantasies of the bluecollar majority. . . . Once upon a time, obscenity was confined to expensive leather-bound editions available only to gentlemen. . . . One of the questions asked by the crown prosecutor [in the trial of the publisher of *Lady Chatterley's Lover*] . . . was: ‘Would you let your servant read this book?’ . . . *Hustler* is the servant's revenge.” Understandably anxious to avoid the embarrassing literary censorship of earlier times, the Court has retreated to a posture in which the erotic tastes of the educated and well bred emerge as part of the “grand conception of the First Amendment and its high purposes in the historic struggle for freedom,” while the less fashionable eroticism of the masses becomes the mere subject of “commercial exploitation of obscene material.” Even if an intelligible line could be drawn between the two categories—and Justice Brennan seems correct in concluding that it cannot—it would remain the case that “grossly disparate treatment of similar offenders,” to use Justice Stevens' phrase, would inhere in the Supreme Court's own “enlightened” position of selective tolerance for the tastefully salacious coupled with contempt for the coarsely vulgar.

Although it might be possible to reconcile first amendment premises as well as norms of even-handed treatment with “time, place, and manner” regulations of sexually explicit or violent materials, the attempt to single out some images or ideas for complete suppression outside the protected enclave of the home seems ultimately incompatible with the first amendment premise that awareness can never be deemed harmful in itself. For in the last analysis, suppression of the obscene persists because it tells us something about ourselves that some of us, at least, would prefer not to know. It threatens to explode our uneasy accommodation between sexual impulse and social custom—to destroy the carefully-spun social web holding sexuality in its place. One need not “sound the alarm of repression” in order to argue that the desire to preserve that web by shutting out the thoughts and impressions that challenge it cannot be squared with a constitutional commitment to openness of mind.⁵⁸

Feminist authors would agree with Tribe that pornography expresses an idea, and even that the idea is in a sense “hedonism.” But it is a bully's hedonism. To them, the sole theme of pornography—regardless of what it superficially depicts—is simply male power.

Pornography is the holy corpus of men who would rather die than change. Dachau brought into the bedroom and celebrated, every vile prison or dungeon brought into the bedroom and celebrated, police torture and thug mentality brought into the bedroom and celebrated—men reveal themselves and all that matters to them in these depictions of real history, plasticized and rarefied, represented as the common erotic stuff of male desire. And the pictures and stories lead right back to history—to peoples enslaved, maimed, murdered—because they show that, for men, the history of atrocity they pretend to mourn is coherent

58. *Id.* at 668-70.

and utterly intentional if one views it as rooted in male sexual obsession. Pornography reveals that slavery, bondage, murder, and maiming have been acts suffused with pleasure for those who committed them or who vicariously experienced the power expressed in them. Pornography reveals that male pleasure is inextricably tied to victimizing, hurting, exploiting; that sexual fun and sexual passion in the privacy of the male imagination are inseparable from the brutality of male history. The private world of sexual dominance that men demand as their right and their freedom is the mirror image of the public world of sadism and atrocity that men consistently and self-righteously deplore. It is in the male experience of pleasure that one finds the meaning of male history.⁵⁹

Or, as Angela Carter says, "the free expression of desire is as alien to pornography as it is to marriage."⁶⁰

Partly because of pornography, "crimes against females are ultimately viewed as expressions of male normalcy, while crimes against men and boys are viewed as perversions of that same normalcy." "A female life warrants protection only when the female belongs to a male," as a wife, daughter, or the like.⁶¹ Otherwise, "[s]exual violence against females protects men and boys rather effectively from male sexual abuse." Despite the taboo, some men do abuse boys, but the explanation is neither homoerotic drives nor relative physical strength. It is, instead, "because a youth is not fully disassociated from women and children."⁶² Similarly, the relative infrequency of father-son (as opposed to father-daughter) incest is a political rather than a biological phenomenon. "Such abuse [of boys] is potentially dangerous to the adult male and would deeply endanger the power of men as a class," since "[a] sexually abused boy can become a sexual aggressor in turn, attack the father and on the physical level, win."⁶³

Poor boys are particularly vulnerable to sexual abuse, not because there are more predatory toughs in the slums, but because "poverty is a humiliating, and therefore a feminizing, experience."⁶⁴

Some pornography depicts lesbians, and one might suppose that the pleasure men derive from this genre refutes the idea that pornography is a celebration of male power over women. Not so, says Andrea Dworkin. In the first place, this type of pornography "does not document lesbian lovemaking: in fact, it barely resembles it."⁶⁵ The purpose of pornography depicting lesbians is, like

59. A. DWORKIN, *supra* note 10, at 68-69.

60. A. CARTER, *THE SADEIAN WOMAN AND THE IDEOLOGY OF PORNOGRAPHY* 13 (1978).

61. A. DWORKIN, *supra* note 10, at 56.

62. *Id.* at 57.

63. *Id.* at 59.

64. *Id.*

65. *Id.* at 46.

that of other pornography, to give men the pleasure of dominating women.

The photograph is the ultimate tribute to male power: the male is not in the room, yet the women are there for his pleasure. His wealth produces the photograph; his wealth consumes the photograph; he produces and consumes the women. The male defines and controls the idea of the lesbian in the composition of the photograph. In viewing it, he possess her. The lesbian is colonized, reduced to a variant of woman-as-sex-object, used to demonstrate and prove that male power pervades and invades even the private sanctuary of women with each other.⁶⁶

Now what about pictures of male homosexuality, produced for male homosexuals? These too are common, and the casual observer might suppose that they have nothing to do with subjugation of women. In truth, however, this type of pornography also oppresses women. For it "consistently uses the symbolic female—the male in drag, effeminacy as a style, the various accoutrements that denote female subjection—as part of its indigenous environment, as a touchstone against which masculinity can be experienced as meaningful and sublime." Thus, male homosexuals "especially in the arts and in fashion, conspire with male heterosexuals to enforce the male-supremacist rule that the female must be that made thing against which the male acts to experience himself as male."⁶⁷ Professor MacKinnon sums it up:

What *is* heterosexuality? If it is the erotization of dominance and submission, altering the participants' gender is comparatively incidental. Since I see heterosexuality as the fusion of the two, but with gender a social outcome (such that the acted upon is feminized, is the 'girl' regardless of sex, the actor correspondingly masculinized), battery appears sexual on a deeper level. In baldest terms, sexuality is violent, so violence is sexual, violence against women doubly so.⁶⁸

It may be said that, since pornography has generally been suppressed throughout history, either men's control has been less complete than feminists suppose, or pornography is not the ideology of male supremacy, though the surfeit of pornography today may be a symptom of *waning* male prerogatives. Evidently anticipating some such objection, Professor MacKinnon provides a rebuttal: "If part of the kick of pornography involves eroticizing the putatively prohibited, obscenity law will putatively prohibit pornography enough to maintain its desirability without ever making it unavailable or truly illegitimate. The same with prostitution."⁶⁹

One of the staples of old-fashioned antismut campaigns was

66. *Id.* at 47.

67. *Id.* at 128.

68. MacKinnon, *supra* note 24, at 651 n.36.

69. *Id.* at 644.

the notion that pornography sometimes causes rape. It was a plausible theory, supported by the horse sense of barbers and cops: "It stands to reason that this stuff is going to drive some guys into frenzies." As so often happens, the plausible theory had several weaknesses. Quite apart from feminism, the experts began to describe rape as more sadistic than sexual, a conclusion that made the pornography-rape connection less intuitively persuasive, except in cases of explicitly violent pornography. And in an era when the president of the high school chess club is likely to own the August issue of *Playboy*, how can one draw conclusions from the fact that a rapist has a copy in his car? Few sophisticates were surprised when the Lockhart Commission found no solid evidence that pornography causes sex crimes.

Once again, the feminists have responded on two levels. New studies, they claim, demonstrate that exposure to pornography—even of the "nonviolent" type—makes men more callous about violence against women.⁷⁰ Some pornographic stories impart the message that haughty women secretly crave cruelly dominant men who won't take no for an answer.⁷¹ Much of the testimony at the Minneapolis hearings was about forcible reenactment of scenes from pornography. Some samples:

Over a period of 18 years . . . [my roommate] was regularly raped by this man. He would bring pornographic magazines, books and paraphernalia into the bedroom with him and tell her that if she did not perform the sexual acts that were being done in the "dirty" books and magazines, he would beat and kill her.⁷²

I was attacked by two white men and from the beginning they let me know they hated my people . . . And they let me know that the rape of a 'squaw' by white men was practically honored by white society. In fact, it has been made into a video game called "Custer's Last Stand." And that's what they screamed in my face as they threw me to the ground. "This is more fun than Custer's Last Stand."⁷³

He would read the pornography like a textbook, like a journal. In fact, when he asked me to be bound, when he finally convinced me to do it, he read in the magazine how to tie the knots and how to bind me in a way that I couldn't get

70. "For example, after only six hours of exposure to pornography, normal men were both less repulsed by the pornography and enjoyed it more. At the same time, they demonstrated an 100% increase in calloused attitudes towards women, and substantially increased trivialization of rape." M. Baldwin, *Pornography: More Than A Fantasy*, HENNEPIN LAWYER Mar.-Apr. 1984, at 8, 9 (citing Zillman & Bryant, *Pornography, Sexual Callousness, and the Trivialization of Rape*, 32 J. COM. 10 (1981)). "Normal males exposed to films such as *Debbie Does Dallas* over only a two week period perceived women as five times as worthless as men who hadn't seen the films, and perceived less than half the injury to the woman." *Id.* at 9, 24 (citing Donnerstein, *Effects of Media Exposure on Attitudes and Aggression*, an ongoing study on file at the Minneapolis City Council Clerk's office).

71. See, e.g., A. DWORKIN, *supra* note 10, at 30-36.

72. Testimony, Session II at 14.

73. Testimony, Session III at 18-19.

out.⁷⁴

All this can be thought of as an effort to respond to the liberals on their own terms, by producing evidence that associates pornography with violence. If the liberals say that consenting adults can do as they please, the feminists reply that the female adults aren't consenting. Yet there is something puzzling about the rape hypothesis, quite apart from the obvious methodological problems. In Susan Brownmiller's version, the theory is incoherent. She says that pornography makes rape "sound like liberated fun."⁷⁵ If her claim is limited to explicitly violent scenes, then it fails as a rationale for suppressing most pornography. If, as seems more likely, she is talking about pornography in general, then one wonders why pictures of what appears to be ordinary, voluntary sex make *rape* look attractive. After all, the men who saw *Deep Throat* didn't know that Linda Lovelace was being held as a sexual slave. So how can the movie have made "rape seem like liberated fun"?

Andrea Dworkin has another theory about the pornography-rape nexus. Pornography's "meanest theme," she says, is that "[w]hat women in private want to do just happens to be what men want them to do."⁷⁶ Pornography, she seems to say, tells two subliminal lies. The first is that the models crave sex; the second is that all women do. Rapists, according to MacKinnon, "typically believe the women loved it."⁷⁷ This sort of speculation, prominent in the feminist literature, may create the impression that additional empirical research can resolve the pornography controversy. Certainly many liberals take the position that pornography should be tolerated if it is "harmless" but suppressed if it "causes sex crimes." They want more evidence, and the feminists are responding to this attitude. But it would be a mistake to read liberal premises into radical feminist arguments. Suppose that fifty Nobel laureates were to certify that pornography does not cause rape. What then? Dworkin and MacKinnon do not, after all, distinguish sharply between "sex" and "rape," and they consider consent to be largely meaningless in heterosexual relations. Robin Morgan calls it "rape" when a man gets sex by "self-deprecating humor" or "silent self-pity," or a "threat of sulking." If we were to rephrase the feminist slogan, from "pornography is the theory, rape is the practice," to "pornography is the theory, sex

74. Testimony, Session II at 68.

75. S. BROWN MILLER, *supra* note 5, at 395.

76. A. DWORKIN, *supra* note 10, at 136.

77. MacKinnon, *supra* note 24, at 653.

with a man is the practice," we might better capture their true meaning, while changing a startling proposition into a truism, believed by everyone from Jerry Falwell to Hugh Hefner to Andrea Dworkin.

5. *Pornography expresses and inculcates racism.* The feminists' basic theory about the status of women and the forcible quality of heterosexual intercourse makes pornography a group libel, analogous to racist tracts; it proclaims that women enjoy force. In addition, Andrea Dworkin finds racist meanings in pornography that depicts interracial sex. She says that the United States is a "race bound society fanatically committed to the sexual devaluing of black skin perceived as a sex organ and a sexual nature."⁷⁸ When black women are portrayed as abused in pornography

[a]ll this punishment is deserved, owing to her sex, which is her skin. The genital shame of any woman is transferred to the black woman's skin. The shame of sex is the shame of her skin. The stigma of sex is the stigma of her skin. The use of her sex is the use of her skin. The violence against her sex is violence against her skin. The excitement of torturing her sex is the excitement of torturing her skin. The hatred of her sex is the hatred of her skin. Her sex is stretched over her like a glove and when he touches her skin he puts on that glove.⁷⁹

Ms. Dworkin also examines the portrayal of a Mexican man in a pornographic book, observing that all such "racially degraded" males are consistently depicted as "superior in terms of brute sexual force." "His sexuality is a savage masculinity, while the phallus of the white carries civilization to the dark places. This is the nexus of sex and race." It is "precisely what licenses violence against him in a racist value system." The point is that women "are worth nothing," and hence "the conquest of them—except for the momentary pleasures of it—means nothing, proves nothing." But the conquest of other men, especially men with a more massive, more brute sexuality, "is sustaining, "because the conquest of bigger, better cock is the ultimate conquest."⁸⁰

The white males offer a bribe to the racially degraded males: if you will collaborate in the degradation of all women, in return we will give you "an acknowledgment of a sexuality of which the racially superior male is envious." "[M]esmerized by the myth of his own masculinity," the racially subordinate male accepts "the ideology that posits the force of his sex as his identity, even

78. *Id.* at 216-17.

79. *Id.* at 215-16.

80. *Id.* at 157.

though this myth often costs him his life.”⁸¹

6. *The first amendment is a tool of the ruling sex.* Traditional justifications for censorship of pornography tend to be self-limiting, because they treat it as a problem of sexual propriety and decorum. To be sure, the sexual net can be cast very wide, but in our time it is hardly likely to catch big schools of political fish. The feminist rationale for censorship raises the stakes. Instead of being mere fantasy, pornography is the propaganda of oppressors. This makes it more harmful, but also more like regular political speech, which can often be described as calculated to bolster a ruling class. The progression from pornography to racist diatribes to antiwelfare pamphlets may not be inevitable, but neither is it unnatural. To avert it will require some dialectical subtlety.

The dialectical problems are not, as such, insuperable. For one thing, it is the feminists' laws, not their theories, that have to pass constitutional muster. (So far, the difference is not great, but that may change.) Besides, tolerance for group defamation is more a matter of expedience than of inevitable first amendment principle. Reasonable people can differ about how to handle the occasional ragtag Nazi band. But if virulently racist pictures and books were a multibillion dollar industry, with a dozen shops and movies in every city, and lurid advertisements in every newspaper (*Sambo Loves the Whip*), only the most doctrinaire fool would want to protect it. If the feminists' characterization of pornography were a plausible analysis of all its genres, then one could make a good argument that pornography is an impermissible means of expressing the constitutionally protected idea that women should be dominated. The legal conclusion is much more commonsensical than its sociological premise.

The radical feminists would prefer not to draw the line at hard-core pornography. Take, for example, the conventional distinction between pornography and erotica. Pornography—especially in its most nauseating and violent forms—is often described as disgusting, even by those who argue against prohibiting it. Erotica, according to a popular view, is quite different—tastefully done, it reflects a healthy sensuality. Given the reasons for their hatred of pornography, it is not surprising that Dworkin and MacKinnon reject this distinction. Ms. Dworkin maintains that “in the male sexual lexicon, which is the vocabulary of power, erotica is simply high-class pornography: better produced, better conceived, better executed, better packaged, designed for a better

81. *Id.* at 157-58.

class of consumer. As with the call girl and the streetwalker, one is turned out better but both are produced by the same system of sexual values and both perform the same sexual service." To call something erotica "means simply that a very bright person made or likes whatever it is."⁸²

Like pornography and erotica, Keats's *Ode on a Grecian Urn* is objectification, "raised to its highest aesthetic level. With pinups too the bold lover will forever love and she be fair."⁸³ "The mystification of female beauty in male culture knows no limit but one: somehow the beauty herself ends up dead or mutilated." This is because "[a]n object is always destroyed in the end by its use when it is used to the fullest and enough; and in the realm of female beauty, the final value of the object is precisely to be found in its cruel or deadly destruction."⁸⁴

Just as rape is difficult to distinguish from ordinary intercourse because the two are in fact so similar, and just as prostitutes resemble wives, so the difficulties of defining pornography are due to its similarity to socially acceptable depictions of women, from Keats to advertisements. As Professor MacKinnon says, "[p]ornography becomes difficult to distinguish from art and ads once it is clear that what is degrading to women is compelling to the consumer." "As women's experience blurs the lines between deviance and normalcy, it obliterates the distinction between abuses of women and the social definition of what a woman is."⁸⁵

Ms. Dworkin responds to questions about freedom of speech by arguing that the first amendment protects oppressors rather than victims.

By definition the First Amendment protects only those who can exercise the rights it protects. Pornography by definition—"the graphic depiction of whores"—is trade in a class of persons who have been systematically denied the rights protected by the First Amendment and the rest of the Bill of Rights.⁸⁶

MacKinnon makes essentially the same point. She criticizes an author who "cannot distinguish between the silence about sexuality that Victorianism has made into a noisy discourse and the silence that has *been* women's sexuality under conditions of subordination by and to men."⁸⁷ By glorifying male power, pornogra-

82. *Id.* at 10.

83. *Id.* at 115.

84. *Id.* at 117-18.

85. MacKinnon, *supra* note 39, at 532 (emphasis in original).

86. A. DWORKIN, *supra* note 10, at 9.

87. MacKinnon, *supra* note 39, at 526 n. 22.

phy helps to throttle women. To suppress it is to promote women's freedom of expression.

7. *Socialism is not enough.* Insofar as it is derivative rather than distinctive, radical feminism resembles Marxism more than any other school of thought. Professor MacKinnon describes one of the Marxist-feminist parallels: "As the organized expropriation of the work of some for the benefit of others defines a class—workers—the organized expropriation of the sexuality of some for the use of others defines the sex, woman. Heterosexuality is its structure, gender and family its congealed forms, sex roles its qualities generalized to social persona, reproduction a consequence, and control its issue."⁸⁸ Marxism and feminism "exist to argue, respectively, that the relations in which many work and few gain, in which some fuck and others get fucked, are the prime moment of politics."⁸⁹

One way to merge Marxism and feminism is by treating the subordination of women as a consequence of capitalism. Marxists have made this argument, claiming also that feminism is bourgeois, meaning that it serves the interests of the ruling class. Feminists, for their part, have charged that Marxism moves within the world view and in the interest of men. Professor MacKinnon concludes that neither set of charges is groundless. Marxists are right that the "individual concept of rights that this [liberal] theory requires on a juridical level (especially but not only in the economic sphere), a concept which produces the tension between liberty for each and equality among all, pervades liberal feminism, substantiating the criticism that feminism is for the privileged few."⁹⁰ But the feminists are also right. "In the feminist view," writes MacKinnon, countries like China and Cuba "have solved many social problems, women's subordination not included."⁹¹ Such societies, while preferable, are still much too patriarchal: "Feminists do not argue that it means the same to women to be on the bottom in a feudal regime, a capitalist regime, and a socialist regime"; nevertheless, "despite real changes, bottom is bottom." To achieve equality, a separate effort is required, one that "can be shaped by revolutionary regime and work relations—but a separate effort nonetheless."⁹²

88. *Id.* at 516-17.

89. *Id.* at 517.

90. *Id.* at 519.

91. *Id.* at 522.

92. *Id.* at 523.

8. *Objectivity perpetuates inequality.* Professor MacKinnon advances another reason why feminists must be "post Marxist." The trouble with Marxist thought, for all its insights, is that it is too objective. This in turn is due to the fact that men invented and shaped it. Thus, Engels's "assumptions about sexuality and women's place" are "linked" to "his empiricist method."⁹³

If the sexes are unequal, and perspective participates in situation, there is no ungendered reality or ungendered perspective. . . . In this context, objectivity—the nonsituated, universal standpoint, whether claimed or aspired to—is a denial of the existence or potency of sex inequality that tacitly participates in constructing reality from the dominant point of view. Objectivity, as the epistemological stance of which objectification is the social process, creates the reality it apprehends by defining as knowledge the reality it creates through its way of apprehending it.⁹⁴

Basically, the idea seems to be that the social reality created by men includes facts that appear to validate patriarchy. Men have not merely conquered women. Far worse, they have created a culture in which many women consent to, enjoy, and even in a sense deserve their subordinate status. In this culture women often behave in ways that confirm sexist stereotypes, whether they are models, or cheerleaders, or wives. Men make women inferior, then point to that inferiority. Men make women consent, then cite that consent. The more total men's control, the more perfectly objective reality will mirror it. The more objective the investigation, the more repressive its findings will be. Others see ways in which a photographer selects and distorts his subject. The feminist sees that photographs, the epitome of objectivity, record the drama that men have written and directed. "Where liberal feminism sees sexism primarily as an illusion or myth to be dispelled, an inaccuracy to be corrected, true feminism sees the male point of view as fundamental to the male power to create the world in its own image, the image of its desires, not just as its delusory end product."⁹⁵ The problem is not to understand the world in which women consent to their degradation, but to change it to a world in which they will not. Once such a world exists, it will no longer be necessary to study whether they consent. In the meantime objectivity perpetuates male power. Therefore, feminists reject objectivity in favor of consciousness-raising, which Professor MacKinnon describes as the feminist method of understanding society—not "reality," for there is "no ungendered reality," but real-

93. MacKinnon, *supra* note 24, at 641 n.11.

94. *Id.* at 636.

95. *Id.* at 640.

ity from women's point of view. Unlike objective studies, consciousness raising is at once perceptive and transformative.

It is an uphill struggle, because men control language. The "systematic" and "hegemonic" male standpoint manifests itself in many phrases and premises. "In the Bible," for instance, "to know a woman is to have sex with her." The sexual meaning of knowledge is also evident in scholarly metaphors such as "a penetrating observation," "an incisive analysis," and "piercing the veil." The recurrent use of such metaphors shows that the male mind "is assumed to function primarily like a penis. Its fundamental character is seen to be aggression, and this quality is held essential to the highest or best working of the intellect." This is why "[f]eminists are beginning to understand that to know has meant to fuck."⁹⁶

II

In Minneapolis, as in other cities, pornography is nominally unlawful but openly available. In the fall of 1983, the city council, responding to complaints from landowners, scheduled hearings on proposals to segregate adult businesses from residential districts by zoning. Professors MacKinnon and Dworkin appeared at a hearing, testifying that zoning was the wrong approach. Instead, the council should give legal recognition to the fact that pornography violates women's civil rights. The council decided to hire the professors as consultants for the purpose of drafting an ordinance.

In a memorandum to the council, MacKinnon and Dworkin explained that "[t]he influence of pornography on men who rule societies, and thus on the development of misogynist [sic] social institutions, can be traced back through feudalism, but it is only through relatively recent technology that the social environment has been glutted with pornography so that it hurts women openly, publically [sic], and with legitimacy."⁹⁷ At the same time, the pervasiveness and open availability of pornography have for the first time in history made it possible to document its effects. It "promotes environmental terrorism and private abuse of women and girls and, to a lesser extent, men and boys and transsexuals [sic]." It "promotes rape, pain, humiliation and inferiority as experiences that are sexually pleasing to all women," and "[t]he studies show that it is not atypical for men to believe and act on the pornogra-

96. *Id.* at 636 n.4. She might also have mentioned "seminal thinker," "pointed out," "intellectual rigor," and "hard evidence." But what are we to make of "excessively rigid position"?

97. On file in author's office.

phy." As they are aroused by pornography, men "learn to connect women's sexual pleasure to abuse and women's sexual nature to inferiority." Men "learn this in their bodies, not just in their minds, so that it becomes a physical, seemingly natural, response." Then, "when real women claim not to want inequality or force, they are not credible compared with the continually sexually available 'real women' in pornography." Since the consumers of pornography make decisions that control women's lives and opportunities, it follows that "[u]ntil women achieve equal power with men, such men are in a position to control women's employment, educational advancement, social status and credibility in the media, on paper, on the street, in meetings, in court, in their own homes, and in public office."

Summarizing testimony in behalf of the ordinance, Dworkin and MacKinnon reminded the council that "we learned that it takes coercion to make pornography"—for instance, *Deep Throat*, the highest grossing film ever. The evidence also showed that "pornography is forced on women and children and that frequently the women and children are then raped or forced to do what is in the pornography." Moreover, "pornography is used in sexual assaults and to plan the sexual assaults."

Conceding that "[i]t is tempting to consider proceeding one step at a time, disallowing the explicit violence while allowing the dehumanization, objectification and submission," the memorandum pointed out that "[t]his would leave the *inequality* intact," and besides, since "it is not a line that is drawn in the pornography" it would "take immense resources to adjudicate" individual applications of such a standard.

Responding to the concerns of civil libertarians, Dworkin and MacKinnon wrote that the proposed ordinance "includes everything that is pornography and does not include anything that is not." For instance, it does not include "erotica, which is sexually explicit sex premised on equality."

Concerning the first amendment, they informed the council that the Supreme Court had upheld controls on child pornography as well as a municipal ordinance prohibiting sex discrimination in advertising.

The First Amendment mainly prohibits state acts that interfere with speech. But there is an affirmative, if less prominent, side to the First Amendment that would allow the silence of women because of discrimination to be taken into the balance. The fairness doctrine in broadcasting, for example, recognizes that government sometimes has an obligation to help make access to speech available on an equal basis. The First Amendment's goals are furthered by restricting the speech of some so that others might have access to it. Pornography directly contributes

to a silencing of women that is socially pervasive. The First Amendment is undermined when women are kept from having access to the social preconditions to exercise the rights of the First Amendment guarantees from infringement by states. Equal access to the means of speech, which pornography discriminately denies to women sexually and socially, is a First Amendment goal that is furthered by this law.

The civil rights approach, unlike morals legislation and police power, is strengthened by the support of legal concepts outside the First Amendment, namely equal protection (the Fourteenth Amendment) and anti-discrimination law. That pornography is the systematic relegation of an entire group of people to second class status on the basis of their gender is a new idea; that the systematic relegation of a group of people to inferiority because of a condition of birth should be illegal is not a new idea. This ordinance to further the equality of the sexes embodies an interest particularly appropriate for that level of representative government closest to the people.

The decision whether to veto this measure cannot have been a pleasant one for the mayor. On one side were traditional civil libertarians, some of whom had denounced the proposal in the media, arguing that by the feminists' logic *The Merchant of Venice* should also be banned. They were joined by some male homosexuals, alarmed by the prospect of losing their kind of pornography. On the other side were militant feminists, including the women from the pornography course taught by MacKinnon and Dworkin. They maintained a candlelight vigil outside his office as he pondered the decision. Many less radical women—liberals as well as conservatives—agreed with them. One of those women was the mayor's wife.

A politically attractive option was to sign the law, announcing that the courts are the proper place to resolve doubts as to its constitutionality. If the Supreme Court then struck it down, the mayor would not be blamed. But the test case would have been costly, protracted, and in all likelihood ultimately unsuccessful.

There was, in addition, considerable authority for the proposition that the mayor, bound by his oath to support the Constitution, had an obligation to veto an unconstitutional ordinance. Tribe's treatise explains:

The United States Constitution addresses its commands not only to federal judges but to all public authorities in the United States. It is at least ironic that generations of students and lawyers preoccupied with lamenting judicial excess have paid virtually no attention to the substantive meaning of the Constitution as a guide to choice by nonjudicial actors. Grant for the moment that judges should not employ the due process clause to strike down a state intrusion upon a woman's decision whether or not to bear a child. That is not my conclusion, but grant it: What follows? Must not a state legislator, voting on a proposed regulation of contraception or abortion, ask whether the regulation would deprive women of liberty without due process of law? Surely that question is not reducible to a measure of constituents' preferences. Equally surely, it is not answerable by any geometry of indisputable reference to an agreed text. That the question is to

be taken seriously *whether or not judges threaten to offer binding answers of their own*, and that its depth is underscored rather than refuted by the nonexistence of indisputably correct replies, seems to me axiomatic.⁹⁸

Without the threat of judicial intervention, a legislator is hardly likely to conclude that a vague phrase like "due process" contradicts his own opinion about contraception or abortion. But Professor Tribe is surely right that politicians ought to take account of the Constitution. Mayor Fraser had a responsibility to calculate the odds that the feminist ordinance would be held invalid. Yet his responsibility did not end there. Since defeat in the courts is rarely certain, he also had to consider the social value of the ordinance. Finally, it was important to consider how much of that value could be achieved without running so great a risk of unconstitutionality. Only then could he conscientiously decide whether defending the ordinance in court was worth the expense.

III

Any law-school sophomore could show that the Minneapolis pornography ordinance was unlikely to survive litigation. The more difficult question is whether the feminists will eventually succeed. It would be rash to suppose that the answer is clear. Cultural fashions come and go; as Professor Charles Reich now knows, most waves of the future become puddles. Add to this the familiar objections to censorship, the difficulties of drawing lines in a sex-saturated society, the legal and financial resources of the sex industry, the moral fragmentation and permissiveness of our culture, and the impossibility of persuading most people that "nonviolent" sex and pornography are in fact "violent." Perhaps effective censorship of pornography is possible today only in a command society. In any event, victory will not come easily. The feminists will have to persevere.

On the other hand, if they do persevere their long-term prospects are not entirely bleak. For the sake of analysis, suppose that the Supreme Court strikes down the Indianapolis ordinance and that the feminists then decide to devise a realistic strategy for getting rid of as much pornography as the Court will allow. (A big assumption, to be sure, but after the first flush of righteousness has subsided many causes acquire a measure of realism.) On those assumptions, it should be possible to achieve some partial but significant victories. The clamorous debate about the feminist ordinances has obscured the fact that hard-core pornography is

98. L. TRIBE, *supra* note 52, at 13-14 (emphasis in original).

already illegal in Minneapolis and elsewhere. The Supreme Court, although receptive to the procedural arguments of pornographers, and to the contention that novels like *Fanny Hill* have redeeming literary merit, has turned a deaf ear to the pleas of Tribe and others for absolute protection of hard-core pornography. From a tactical standpoint, therefore, opponents of pornography need to answer two critical questions: (1) Why does pornography flourish despite being illegal? (2) What is the most effective way to overcome this enforcement problem, without being nullified by the Supreme Court?

There is no reason to believe that the feminists have ever thought realistically about those questions. Judging by their writings, their theory is that pornography exists because male politicians, police, and judges want to maintain male supremacy; and it is illegal only because that adds the spice of adventure to the thrill of power. No doubt male attitudes have played an important role, if only because men like pornography better than women do. But if men are implacably hostile, then it will be equally futile to pass a feminist pornography ordinance. The feminists cannot prevail unless they are wrong about men.

Superficially, at least, the most practical reform would have been to retain the traditional definition of pornography, while devising more powerful sanctions. The idea that pornography degrades women could have been put in a prefatory "policy" section, where vagueness would be unobjectionable. The current Supreme Court might well uphold a carefully-drafted public nuisance law, enabling courts to shut down adult cinemas and bookstores.⁹⁹ Instead of approaching the problem in this fashion, the feminists devoted most of their effort to redefining pornography along feminist lines. Their definition probably encompassed more than hard-core pornography, but for that very reason (in addition to its vagueness) the Minneapolis ordinance probably would not have been upheld by the Supreme Court. As applied to hard-core pornography, the feminist definition made nothing illegal that was not already illegal, and ran the risk of being construed to permit all forms of pornography in which neither of the models appears

99. See *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980). In that case, the Court struck down a public nuisance law that authorized state judges, on the basis of a showing that a theater exhibited obscene films in the past, to enjoin its future exhibition of films not yet found to be obscene. But one of the Court's rationales stressed a curable defect—that the statute did not preclude punishment of an exhibitor for violating an injunction later found to have been unconstitutional. Besides, the four dissenters—Burger, Powell, White, and Rehnquist—might now be able to form a majority with Justice O'Connor and perhaps additional Reagan appointees.

to be more "female" or "subordinate" than the other—photographs of mutual masturbation if not of homosexuals. (Or would these present women as "whores by nature"?)

The suits by coerced models and rape victims, authorized by the ordinance, were unlikely to affect the volume of pornography even if a few individual plaintiffs were able to overcome the severe problems of proof. In short, the ordinance was better drafted to publicize an ideology than to change a city. But by the same token its defects are curable, if the feminists ever decide that they are willing to settle for getting rid of hard-core pornography.

In the long run, the feminists may forge new alliances. For the moment, conservatives are the most obvious allies, because—excepting only a few libertarians—they have generally wanted to censor pornography. Conservatives are less likely than liberals to believe that pornography can be sealed off so that it affects only consenting adults or that it will go away if we stop fussing about it. Although educated conservatives are perhaps less certain of pornography's precise effects on conduct than the radical feminists profess to be, they often affirm that it affects the quality of life. Like the feminists, they are prepared to suppress it now, without waiting for compelling proof that it causes sex crimes. They will even subscribe to the notion that pornography "degrades women"—an ambiguous formulation with wide appeal.

Why then was a separate feminist analysis necessary? Part of the answer may be that conservative support is disorienting, since according to feminist theory patriarchs and their lackeys should be on the other side. Susan Brownmiller offers a better reason: the conservatives who oppose pornography have tended to be too Southern, too religious, and too right-wing for feminist tastes.¹⁰⁰ Culturally, they are the enemy—in general, and in their attitudes toward most feminist issues. Another consideration, not mentioned by Brownmiller, may also be important. Conservatives—even cosmopolitan ones—tend to justify the suppression of pornography on grounds that are anathema to feminists. George Will is an excellent example. He favors censorship, but with an argument no feminist can accept: that pornography, *like abortion and homosexuality*, is only superficially a matter of purely "private values"; all three issues, says he, are legitimate subjects of public concern and regulation.¹⁰¹ Given the feminists' opinions about abortion and homosexuality, they needed a rationale for suppressing pornography that would not prejudice the defense of in-

100. S. BROWNMILLER, *supra* note 5, at 393.

101. G. WILL, STATECRAFT AS SOULCRAFT 84-85 (1983).

dividual autonomy in other sexual and reproductive spheres. Nothing with overtones of traditional values, or deference to community standards, or judicial restraint, would have been suitable.

Irving Kristol, one of the finest conservative thinkers, contends that pornography is wrong because it makes a "public" display of activity that is properly "private."¹⁰² This seems to be the most common conservative justification for prohibiting pornography. But it is surely unacceptable to radical feminists. Marital privacy protects vicious husbands. As Professor MacKinnon says, "feminist consciousness has exploded the private. For women, the measure of the intimacy has been the measure of the oppression. To see the personal as political means to see the private as public."¹⁰³ It is the private activity, not merely the public pictures of it, that is oppressive.

Walter Berns, another thoughtful conservative, believes that there is a connection between shame and self-restraint and hence between shame and self-government.¹⁰⁴ Again, the conservative theory is unacceptable to feminists. Words like "self-restraint" and "shame" imply at least token respect for conventional sexual mores. "Self-government" affirms a belief in the bourgeois political system. On both counts, Berns's theory is the antithesis of radical feminism.

To many people, pornography is grotesquely bad manners—an assault on civility. That theory, however, has not commended itself to radical feminists.

Where do men of the Left fit into the picture? Many intellectuals, especially of the older generation, will continue to fight for *laissez-faire*. Their ideas were fixed in an earlier era, when the philistines were suppressing novels. At least for a season, theirs is still the voice of liberalism. But most men seem fundamentally indifferent to the fate of pornography. Even liberals care about it chiefly because it implicates sexual, literary, and political freedom. They are motivated far less by love of pornography than by fear of the kind of person who has traditionally wanted to censor it. If censorship decisions were entrusted to judges rather than administrative bodies, then perhaps some liberals' fears of right-

102. I. KRISTOL, *Pornography, Obscenity, and the Case for Censorship*, in REFLECTIONS OF A NEOCONSERVATIVE 43 (1983).

103. MacKinnon, *supra* note 24, at 646. "The separation of public from private is as crucial to the liberal state's claim to objectivity as its inseparability is to women's claim to subordination." *Id.*

104. Berns, *Beyond the (Garbage) Pale, or Democracy, Censorship and the Arts*, in THE PORNOGRAPHY CONTROVERSY 40 (R. Rist ed. 1975).

wing fanatics would be assuaged.¹⁰⁵ Anyhow, by purging the rationale of censorship of all prudish and right-wing connotations, the feminists have done much to make it potentially acceptable to liberal men, if their first amendment concerns can be met. As with abortion, the women of the intelligentsia may be able to lead their men.

Some messages, let us recall, are believed only if they come from a respectable source and are expressed in respectable catchwords. It took an Eisenhower to settle the Korean War without victory. It took a Nixon and a Reagan to tell the Right that the People's Republic of China will remain. It takes Black Muslims to tell poor blacks that they must be self-reliant. Similarly, feminists have been the purifiers of conservative dogma, cleansing it for use by the liberal intelligentsia. They are also serving the sometimes overlapping purpose of teaching postliberal values to male intellectuals. The process is far from complete; it is camouflaged by liberal antidiscrimination rhetoric; and many men are still resisting. But across a wide range of topics—from comparable worth to pensions to pornography—the antidiscrimination rationale doesn't quite fit, and so one suspects that we are witnessing something more fundamental: the erosion of liberalism rather than its perfection.

Only women of the Left could have persuaded the male intelligentsia that sometimes it is the prosecution, not the defense, that needs to be bolstered in criminal cases. Their position concerning rape prosecutions, like their position on pornography, superficially resembles the conservative one, and it is eminently reasonable. But it never caught on in the universities until it was espoused by feminists, in the rhetoric of egalitarianism. The traditional liberal bias was well-expressed by a Yale law professor: "Criminal defendants make up our poorest, most powerless, most despised minority."¹⁰⁶ For sex crimes, this stereotype is no longer fashionable. The feminists have reversed the roles in the familiar morality play: the rape victim (rather than the defendant) is "powerless," "despised," and mistreated by our culture; the societal "crime of nonpunishment" replaces the societal "crime of

105. As Matthew Stark, head of the Minnesota Civil Liberties Union put it, in a debate with Andrea Dworkin: "As soon as the (government) votes in the committee to decide what we can read, who'll be on that committee? I can assure you, Andrea and I won't be." *Minneapolis Trib.*, May 20, 1984, at 24A, col. 1. One supposes that Mr. Stark's implied willingness to be censored by Andrea Dworkin was insincere, but even on that hypothesis the statement is revealing. The committee in question was presumably the one that hears complaints of sexual, racial, and other discrimination in Minneapolis.

106. Duke & Malone, *Burger Court Shows Its Bias*, *Minneapolis Trib.*, Oct. 26, 1984, at 17A, col. 1.

punishment." The individual defendant is a guilty white man instead of a falsely accused black. He is a repulsive character, sometimes even a Nazi (Brownmiller) or a persecutor of Native Americans (Minneapolis pornography hearings). At bottom, though, like the "powerless" defendant of yore, he lacks individual moral significance, because he embodies society's failings.

Other scripts are also being rewritten. So long as doubts about recreational sex were being expressed mainly by people with bourgeois values, no respectable liberal could agree. The old attitudes had to be rewritten, cleansed of Victorian overtones, and expressed in the very jargon of liberation that—in another guise—had celebrated free love. Thus, Germaine Greer expresses her new sexual values by attacking Western cultural imperialism—Indian women, she believes, are wiser than the arrogant white advocates of birth control.¹⁰⁷ (A more straightforward tribute to motherhood would have sounded too conservative.) When faculty-student sex was thought of as a problem of sexual permissiveness, it was hard for the intelligentsia to censure it severely. Now the feminists are redefining it as a problem of exploitation, and their men are joining them in condemning it. So long as doubts about the hour and wage laws were being voiced only by selfish capitalists and reactionary judges, no liberal scholar could pay much attention. Today, as feminists denounce "the chains of protection" (Judith Baer's label) the male professors are listening respectfully. In pornography law too, class may eventually be more decisive than sex.

A transition from the hedonism of the sixties to the censorship advocated by the feminists might seem to refute Leibnitz's dictum that there are no leaps in nature. But is it a great leap, to go from arguing that to suppress *Hustler* would be class discrimination against blue-collar men, to arguing that *not* to suppress it is discrimination against women? Although they lead to opposite results, these arguments are both cut from the philosopher John Rawls's bolt of equality cloth. It is the Left's way of wrapping yourself in the flag.

The absurdity of applying Jeffersonian principles of free speech to close-ups of vaginas is nicely matched by the absurdity of saying that a sailor's pin-up picture is like a swastika. On neither side is there empathy or complexity or uncertainty. Their opponents are Comstocks (Tribe) or Hitlers (Dworkin). On both sides, we hear the gong of monist ideology.

107. G. GREER, *supra* note 21, at 141-42.

The *laissez-faire* attitude—that a taste for pornography is like a taste for broccoli—is in some ways similar to the feminists' moral cosmos. For the feminists, as for Tribe in his treatise, it all depends on your point of view. Pornography is neither good nor bad; it's good for some and bad for others. The difference is that the feminists define point of view in group (gender) terms instead of individual terms, adding the customary innuendo that the "victim's perspective" is morally superior to the "perpetrator's perspective." They have replaced atomistic liberalism—where it's every Portnoy for himself—with a vision of two giant armies, the forces of darkness against the forces of light, each attacking logically in accordance with its interests. This world-view parallels some Marxist analyses of race relations. At least on the far left, it may be equally acceptable in the field of pornography.

All this will take time, struggle, and revision—even at the best schools, few men will want their Dworkin neat. And so far the prognosis is almost entirely conjectural. Almost—but not quite. Already a tiny vanguard of men has begun to reconsider pornography. Harvard Law School led the way, designating Professor MacKinnon as its 1984 Francis Biddle Memorial lecturer on civil liberties. She denounced pornography before an overflow crowd of professors and students.

Individual men have also begun to make contributions. John Stoltenberg, for example, is chairman of the Anti-Pornography Task Force of the National Organization for Men. At the United Ministries building in Minneapolis, he conducted a workshop designed to teach men how it feels to be a model for pornography.¹⁰⁸ Seven male volunteers—all fully clothed—reclined on the floor and contorted their bodies to mimic the poses of women in "men's magazines." Stoltenberg led forty-one other men and women around the room to instruct the models. "Look seductively at us," requested one woman. "Now smile—a cutesy smile, like a little girl." One of the men, lying on his back, legs in the air, with his hands clasping his buttocks, was told to "arch your back more." After it was over, another man said that he had felt "totally humiliated," and "totally objectified and exploited."

Legal scholars, one supposes, will be less easily swayed. They will surely insist on careful drafting and procedural safeguards for defendants. They will want distinctions between pornography and ordinary political speech. But some will be supportive. Tucked away among the letters that members of the Minneapolis City Council received as they wondered whether to override

108. *Minnesota Daily*, May 14, 1984, at 1, col. 1.

Mayor Fraser's veto, is one from an indignant law professor:¹⁰⁹

Dear Council Member:

As a Constitutional scholar and lawyer, and author of the treatise *American Constitutional Law*, I am writing to express dissent and dismay at Mayor Donald Fraser's veto of your ordinance to define pornography as a violation of civil rights.

This veto is an abuse of the fundamental structure of our system of government. In the name of not passing the buck to the courts, a view with which I am in general sympathetic, the Mayor has acted unilaterally to deprive the courts of their unique Constitutional function: to pass on legislation that is not obviously unconstitutional. Hiding behind the First Amendment in the face of this novel measure, whose supposed invalidity follows surely from no clear precedent, the Mayor has usurped the judicial function.

While many hard questions of conflicting rights will face any court that confronts challenges to the ordinance, as drafted it rests on a rationale that closely parallels many previously accepted exceptions to justly stringent First Amendment guarantees. While remaining uncertain myself as to the ultimate outcome of a judicial test, I urge you not to allow an executive to prevent the courts from adjudicating what may eventually be found to be the first sensible approach to an area which has vexed some of the best legal minds for decades.

If you would like to discuss your questions or concerns, please feel free to call me at my office at the number above.

Sincerely yours,

Laurence Tribe
Tyler Professor of
Constitutional Law

109. Reprinted in HENNEPIN LAWYER, *supra* note 70, at 17.